

Telemarketers from Florida, or anywhere in the nation, are prohibited from placing calls to any number included in the Florida database. Under the Florida Act, telemarketers can be fined up to \$10,000 for calling numbers included in the database. 33/ Companies may purchase the database for between \$30.00 - \$100.00 per quarter, depending on whether they need data from one or more area codes or the entire state.

- B. A national database can be implemented easily that would address the Commission's concerns about the Florida model.

The Notice acknowledges the Florida database system as a possible model, but suggests that there would be problems implementing such a system at the national level. 34/ On closer examination, however, it becomes apparent that those problems are not significant, and that a national database would be the most effective, economical, and practical way to implement congressional intent.

1. The national database can be self-funded.

The Commission has suggested that the public interest would not be served by government administration of a national

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33/ Florida Act, Fla. Stat. ch. 501.059(8).

34/ Notice at para. 28.

database. 35/ However, private database companies, such as LeJeune, clearly could and would be interested in administering the system. Moreover, private companies could do so in an efficient, cost-effective manner. A national database could be created, maintained, and distributed on a monthly or quarterly basis, providing greater accuracy and more timely information than directory markings, and administrative ease for telemarketer compliance with federal and state regulations.

Consumers would not need to be charged for participation in the database. One of the drawbacks of the Florida system is the imposition of fees on consumers which create disincentives for participation. Congress, however, has recognized that this funding structure need not be perpetuated at the federal level. 36/ Private companies could profitably administer a national database funded solely through charges to telemarketers. 37/ Business customers could opt to purchase the list in tape, diskette, or printed media. LeJeune estimates a conservative annual revenue projection of

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35/ Notice at para. 29.

36/ See 47 U.S.C. § 227(c)(2), (3)(E).

37/ For example, a voluntary database is maintained by the Direct Marketing Association at no charge to those whose numbers are included. Fees for access and use of the database are paid by telemarketers.

approximately \$2.5 million from telemarketer purchases of the database lists. Administrative expenses associated with the database could easily be covered by this revenue stream. 38/

To minimize government involvement, the Commission could solicit proposals from private companies and select the best-suited company through a Request for Proposal (RFP) process similar to that used to select the Downtown Copy Center or the Mellon Bank for their services. To assure that all of the Commission's concerns are addressed by the implemented system, the RFP would request information on the cost of service implementation, update frequency, and pricing to telemarketers. The Commission could also specify minimum system requirements, such as quarterly or monthly updates, 800 number access for consumers, advertising or information requirements for consumer awareness, and other system

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38/ These projections are based on information from the State of Florida indicating costs of approximately \$300,000 annually to administer their database, and estimates of the additional incremental costs to serve the rest of the nation, the number of consumers likely to be listed, and the number of telemarketers likely to require access. On this basis, LeJeune estimates that the database would be profitable if telemarketers were charged for area code (\$35.00 per quarter), state (\$75.00/quarter), geographical region (\$150.00/quarter), or complete nationwide (\$250.00/quarter) lists. Alternatively, database updates could be distributed monthly for a correspondingly lower fee, or in paper form for a minimal charge. These fees would more than offset the expense of administration of a national database.

parameters. The Commission could require the selected vendor to reimburse it for the costs of the procurement. Thus, a national equivalent of the Florida database system could be implemented at no cost to the public or the government. LeJeune believes that such a venture would be an attractive and profitable one for the private administrator.

2. Consumer participation in the database would be easy and raise no privacy concerns.

As indicated above, residential consumers would be provided a toll-free number to contact the administrator to be included in the database. No application would be necessary because a fee would not be collected. Technology is available to verify instantly that the caller is restricting a bona fide residential listing. 39/ Consumer awareness of the database would be accomplished through messages included in residential telephone billing statements, press releases, and other advertising or publicity efforts initiated by the administrator. 40/

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39/ The administrator could send back a verification notice to the consumer indicating the number was entered in the database.

40/ The Florida law received widespread media coverage, and similar exposure would be achieved at the national level.

Congress specifically provided that local telephone companies would assist in notifying consumers. 41/ Local telephone companies would be required to include information on availability of the database each quarter. A separate billing insert is unnecessary; a message on the billing statement would be sufficient. The burden and cost to the local telephone companies would be minimal. 42/ The message would include the 800 number for customers to contact the administrator.

Implementation of a national database raises no consumer privacy concerns because consumers voluntarily participate in the database. The database would include only the consumer's phone number, address, and name -- information which is generally available in local telephone directories. Moreover, the Act requires that the database be used only to

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41/ See 47 U.S.C. § 227(c)(3)(B), (C), (L).

42/ For example, Southern Bell includes such a message in its Florida customers' billing statements. The message provides in pertinent part:

The Telephone Solicitation Act provides that consumers may register their telephone numbers in a "No Sales Solicitation" list published by the Florida Department Agriculture and Consumers Services, Division of Consumers Services. With certain exemptions, telemarketers are prohibited from placing a sales solicitation call to any number that appears on the Division's list or any unlisted or unpublished telephone numbers. . . . For further information, please contact: Division of Consumer Services, Mayo Building, 2nd Floor Tallahassee, Florida 32399-0800, 1-800-342-2176.

comply with state or federal nonsolicitation requirements and, therefore, the list would not be available for purchase for any other purpose. 43/ As required by the Act, these numbers would not be available for reprint or distribution in any manner other than the distribution of the database to businesses on a monthly or quarterly basis. 44/ Finally, unlike industry or company lists, no access to proprietary marketing lists is required, since all telemarketers access a single, all-inclusive list.

3. Compliance with a national database system would be simple and nonburdensome.

Businesses conducting telemarketing would also be beneficiaries of a national database system. Rather than monitoring and adapting to numerous state regulations, compliance could be handled simply through one entity -- the national database administrator. The cost of participation in the database would be appropriately recovered from the telemarketing community as a whole. Telemarketing entities would purchase the nonsolicitation list from the administrator at prices that would vary with the coverage required by the telemarketer. Prices would be tailored to assure that even the

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43/ 47 U.S.C. § 227(c)(3)(K).

44/ See 47 U.S.C. § 227(c)(3)(K).

smallest telemarketing operators would not be unduly burdened. Once a telemarketer acquired the appropriate list, compliance would be simple. LeJeune has discussed how its SRS and similar call restriction technologies can automatically crosscheck call attempts against the list of restricted numbers.

4. A national database would simplify enforcement and avoid unnecessary disputes.

A national database would provide a bright line standard for enforcement of the TCPA. Since the statute distributes enforcement responsibilities among a variety of venues, a uniform, easily applied standard is essential to effective, even-handed enforcement. <sup>45/</sup> With a national database, telemarketers will know when they are in compliance with Commission regulations, and consumers will know when they have a legitimate, actionable complaint. <sup>46/</sup> Moreover, the Commission, the courts, and other adjudicatory and enforcement bodies would apply a uniform clear enforcement standard, providing across-the-board consistency in every forum and

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<sup>45/</sup> The Act provides for a private right of action for individuals, enforcement by state attorney generals and state agencies, or enforcement by the Commission. 47 U.S.C. § 227(c)(5), (f).

<sup>46/</sup> We recognize that telemarketers will need time for compliance, such as sixty days from the date a name is included in an update, but this does not in any way change the need for a bright line standard for enforcement purposes.

speedy resolution of disputes. Thus, with the use of a national database, telemarketers would have a safe harbor for compliance and consumers could accurately and easily evaluate their claims; such certainty will improve compliance and minimize disputes.

C. Alternative restriction methodologies are ineffective or impractical.

None of the other alternatives suggested by the Commission would be as effective as a national database. Furthermore, these alternatives would impose cost burdens on the Commission, consumers, telemarketers, and local phone companies that would not exist with a national database plan.

1. Network technologies.

Network call blocking technology is not practical at this time. For consumers to block calls at their homes, telemarketers would need to be placed on identifiable and blockable exchanges. The resulting burden on consumers, phone companies, and marketers would be great. Consumers might have to purchase equipment or additional phone service features to block the calls. <sup>47/</sup> Alternatively, they would have to

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<sup>47/</sup> Any requirement that consumers purchase additional equipment or phone features to block solicitations would appear

[Footnote continued]



instruct the telephone company to block the calls, with those costs passed back to the telemarketers. The mechanism for such cost recovery is difficult to evaluate at this time; presumably per call charges are not possible, so telemarketers would have to pay some flat fee based on average costs.

Since the technology has not developed to the extent that all telemarketers could be moved onto a single exchange, phone companies would have to juggle numbers and migrate telemarketing customers to identifiable exchanges and configure network capabilities to permit consumer blocking. Telemarketers, including large and small companies, one-time sales efforts, or on-going telephone solicitors, would have to conduct service over special separate lines configured with blockable exchanges. 48/ None of this will be practical in the foreseeable future.

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47/ [Footnote continued]

to contravene express congressional intent. The Act specifically requires the Commission to implement regulations that place no additional economic burden on residential subscribers. 47 U.S.C § 227(c)(2), (3)(E).

48/ Calls placed for non-solicitation purposes would have to be made over different lines to assure that the calls would go through.

2. Special directory markings (asterisk regulations).

As a voluntary measure, directory markings have proven largely ineffective. <sup>49/</sup> Thus, to carry out the requirements of the TCPA, a mandatory marking system would be necessary. Directory markings would shift the burden of assembling and maintaining a database from a national database administrator to individual local telephone companies and telemarketers. Each telephone company would have to maintain a separate listing, and these lists would need to be kept in a form that could be readily updated and utilized by telemarketers. Telemarketers would then have to obtain and assemble these multiple listings for purposes of regional and national sales. Overall, directory markings would be more cumbersome for the Commission, telemarketers, and local telephone companies than would implementation of a national database.

If mandatory directory markings nevertheless are used to implement the TCPA, then the Commission must formulate specific regulations to make such a system more effective than it is today. The Commission must assure adequate notice to

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<sup>49/</sup> Indeed, since compliance is voluntary, directory markings have even resulted in specific targeting of listed numbers by unscrupulous telemarketers seeking to gain an advantage over the competition by contacting consumers that will not be called by more privacy-conscious firms.

consumers of the opportunity to participate in the marking system and regulate the terms and conditions of access by telemarketers to the telephone company lists.

LeJeune would note one particular problem with directory markings today. Even in those locations where they are available at all, telephone companies often do not provide listings in a tape or diskette format. Effective telemarketer compliance is best assured through an automatic blocking service that uses computer crosschecking to prevent mistaken or purposeful calls to listed numbers. As a result, directory listings must, at a minimum, be provided in a computer-readable format. Again, however, a national database system as proposed above would avoid all of these problems.

### 3. Industry/company lists.

Voluntary industry or company lists have existed for years without widespread use or acceptance. Although self-regulation is commendable, Congress has already decided that in this area it is ineffective.

First of all, such industry-generated lists completely fail to meet the needs of consumers who do not want to receive even the first call. The TCPA has the broad goal of protecting the privacy of consumers who do not want to be solicited by telephone at all. The Commission would be defeating that purpose if consumers had to receive one or more calls, let

alone take multiple actions, to register their objections to solicitations. Yet the Notice provides no indication what action a customer would have to take to be included on such a list, and consequently, the consumer receives no assurance of when or even if calling will cease. Furthermore, each industry or company list represents only a small fraction of telemarketers. Consumers would have to contact "list maintainers" individually to be added to their "do not call" databases. As telemarketing continues to grow rapidly, the number of such lists also will explode. This burden on the consumer to contact each and every firm is unworkable and provides insufficient protection to consumers. Indeed, it violates the TCPA insofar as it imposes substantial costs on consumers to protect their own privacy.

If company or industry developed lists must be made available to outside telemarketers, additional regulations would be required to provide a mechanism for companies to circulate these lists without implicating proprietary or privacy concerns. Finally, enforcement will be much more expensive for all parties. Foreseeably, litigation costs will be significant as parties debate whether a given consumer should have been on a given list. Considering the penalties and enforcement provisions of the Act, maximum certainty in this area is necessary to avoid chilling legitimate telemarketing.

In sum, to render the industry or company lists effective, the Commission would have to promulgate still more regulations establishing parameters for consumer inclusion in these databases, coordinate distribution of proprietary lists, and involve itself in more complex enforcement cases. LeJeune believes that industry lists are unworkable; in any event, they are clearly less effective and cost-efficient than a national database.

#### 4. Time-of-day restrictions.

Reliance on time-of-day regulations would be insufficient to address the nuisance of phone solicitation to consumers that value their privacy at all times of the day. In addition, a blanket time-of-day provision would be overbroad because telemarketers could not contact willing participants during the off-limit hours. Significantly, with a national database, entries could be qualified with time-of-day restrictions for residential subscribers that do not object to receiving calls during certain hours. But generic time period restrictions standing alone would not address congressional concerns.


#### CONCLUSION

Congress has made clear in the TCPA that the Commission must adopt "methods and procedures" to protect consumers from unwanted telephone solicitations. The

Commission can best carry out its obligations under the Act by adopting a national database approach. That database should be modeled on the Florida system, which is practical and effective for both consumers and telemarketers.

Respectfully submitted,

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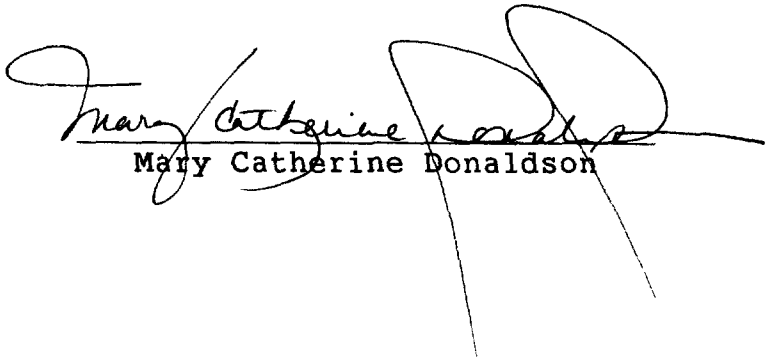
CERTIFICATE OF SERVICE

I, Mary Catherine Donaldson, hereby certify that on this 26th day of May, 1992, a copy of the foregoing "Comments of LeJeune Associates of Florida" was served by hand on the following:

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